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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSLYVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Appellants,

vs.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, his wife, *et al.*,
Intervening Parties Appellees.

On Appeal from the United States District Court For the Eastern District of Pennsylvania

BRIEF OF AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH, JEWISH LABOR COMMITTEE, JEWISH WAR VETERANS, NATIONAL EDUCATION ASSOCIATION, NATIONAL COUNCIL OF JEWISH WOMEN, UNION OF AMERICAN HEBREW CONGREGATIONS, UNITED SYNAGOGUE OF AMERICA and UNITARIAN UNIVERSALIST ASSOCIATION, *AMICI CURIAE*

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This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

This proceeding was initiated by the appellants (three individual taxpayers and four organizations) against certain officers of the Commonwealth of Pennsylvania challenging the constitutionality of two Pennsylvania statutes, Act 194, July 12, 1972, Pa. Stat. tit. 24, Sec. 9-972, and Act 195, July 12, 1972, Pa. Stat. tit. 24, Sec. 9-972. The statutes provide various forms of aid for the operation of church-affiliated and other nonpublic elementary and high schools. Appellants sought a declaratory judgment that the statutes violate the Religion Clauses of the First Amendment to the United States Constitution and an injunction against their operation.

A three-judge District Court was convened. After appropriate hearings, it issued the following rulings:

1. Dividing 2 to 1, it upheld the provisions of Act 194, under which public school authorities are required to furnish "auxiliary services" to children in nonpublic schools on the premises of their schools, up to a cost of $30 per pupil. The program includes guidance, testing, remedial and "such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

2. It unanimously upheld the provisions of Act 195 requiring the state to purchase and to lend to nonpublic school pupils "textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth," up to a limit of $10 per child.

3. It upheld by a vote of 2 to 1, with a limitation noted below, the provisions of Act 195 requiring the state to purchase and to lend "instructional materials and equipment" to nonpublic schools, up to a limit of $25 per child. The loan is to be made on request of a nonpublic school official "on behalf of nonpublic school pupils." The Act defines "instructional materials" as such materials as books, records, tapes and films, and "such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." The term, "instructional equipment," is similarly defined. The court below unanimously ruled that the provision concerning equipment was invalid to the extent that it went beyond equipment which "from its nature cannot readily be diverted to religious purposes, and is particularly designed or designated for such secular educational purposes as provided for in said statute and its accompanying duly-promulgated guidelines for the administration of such statute" (Jurisdictional Statement, pp. 102a-103a).

The plaintiffs noted their appeal to this Court. (No cross-appeal was taken by the defendants from the limitation on the equipment provisions.) This Court noted probable jurisdiction on October 15, 1974.

Question to Which This Brief Is Addressed

Do the provisions of Acts 194 and 195 providing governmental assistance to religiously affiliated elementary and secondary schools in the form of auxiliary services, instructional materials, instructional equipment and textbooks violate the Establishment Clause of the First Amendment to the United States Constitution?

Interest of the *Amici*

The American Association of School Administrators is a voluntary nation-wide organization of school administrators. Its membership includes administrators from all over the country. It supports the submission of this brief *amici curiae* on the basis of its traditional support of the principle of separation of church and state.

The American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, Jewish Labor Committee, Jewish War Veterans, National Council of Jewish Women, Union of American Hebrew Congregations and United Synagogue of America are national Jewish organizations, each of which is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and that it has proved of inestimable value both to religion and to the community generally. They join in this brief because they believe that the program embodied in Acts 194 and 195 would be a

form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent.

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: The American Baptist Churches in the U.S.A., the Baptist General Conference, the National Baptist Convention of America, the National Baptist Convention, U.S.A., Inc., the North American Baptist General Conference, the Progressive National Baptist Convention, Inc., the Seventh Day Baptist General Conference, and the Southern Baptist Convention. Among Baptists, religious liberty is a fundamental and sacred principle. It is the opinion of the Baptist Joint Committee on Public Affairs that the principle is jeopardized by the decision on appeal in this case.

The Board of Church and Society of the United Methodist Church is one of the four national program agencies of the Church. Its policies are determined by the Board's 90 members who are elected democratically from five geographical areas of the nation. Among the members of the Board are lawyers, judges, teachers, social workers, business people, homemakers, youth and clergy. The purpose of the Board is "to analyze the issues which confront the person, the local community, the nation and the world and to encourage Christian lines of action * * *."

The National Education Association (NEA) is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person

interested in advancing the cause of education. It is the largest professional organization in the nation. The NEA has participated as *amicus curiae* in numerous cases before this Court in an effort to strengthen public education by preserving the American tradition of separation of church and state.

The Unitarian Universalist Association is an association of churches and fellowships in the United States and Canada. A resolution adopted by the Association at its 1972 General Assembly said, in part: "• • • the Unitarian Universalist Association reaffirms its support of the principle of separation of church and state in the United States and urges Unitarian Universalist Societies to: Oppose all direct or indirect Federal, state or local tax aid to church-related schools on all levels • • •."

Summary of Argument

The present proceeding represents still another effort to overturn the principle that the First Amendment bars large-scale governmental financing of schools maintained by religious institutions. The decisions of this Court, however, establish that only clearly secular programs involving no substantial support or close supervision by the state are permissible.

I. The provisions in Acts 194 and 195 providing auxiliary services, instructional materials and instructional equipment to parochial schools violate the Establishment Clause.

A. These provisions have a sectarian purpose. There is no clear legislative declaration of a secular purpose and, in any case, such declarations should not be routinely accepted at face value.

B. These provisions likewise have a sectarian effect since the procedures approved by the court below could be used to subsidize most of the operations of a sectarian school.

C. These provisions would involve entanglement of church and state in their administration. It would be necessary for school administrators to adopt procedures designed to ensure that personnel sent to teach in sectarian schools in fact acted independently of the school administration and its religious mission. Prior decisions of this Court proceed on the assumption that it is difficult if not impossible to make sure that any particular teacher is refraining from sectarian activity in the atmosphere of a sectarian school.

With respect to instructional equipment, the limitation imposed by the court below either nullifies that section or means very little. In any case, enforcement of this requirement would require such close and constant supervision of the day-to-day use of equipment as to bring about impermissible entanglement.

D. Finally, the provisions in question would involve political entanglement of church and state. Each time they were to be financed, the legislature would be embroiled in conflicting efforts to have their amounts increased or reduced.

II. The provisions regarding textbooks in Act 195 violate the Establishment Clause. Experience shows that the textbook program approved by this Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), has not worked out as expected. In the absence of careful policing, sectarian books have in fact been financed out of state funds. This fault in the program cannot be corrected without an impermissible degree of administrative entanglement.

ARGUMENT

The present proceeding represents still another effort to bring about large-scale governmental financing of schools maintained by religious institutions as part of their religious mission. It is thus a fresh attempt to overturn the precept, taken virtually for granted for more than 150 years, that the First Amendment bars such financing. In the words of this Court in *Everson* v. *Board of Education*, 330 U.S. 1 (1947): "No tax in any amount, large or small, can be levied to support any religious activities or institutions • • •."

At least as it applied to the financing of church-related schools, this declaration was neither startling nor precedent-making. Up to 1947, when it was made, and even for another 20 years, the expenditure of state funds for the benefit of such schools was limited to two areas—health benefits, police and fire protection and similar services as to which there was no constitutional problem, and such "fringe benefits" as busing and textbooks, the latter being extended in only a very few jurisdictions.

A substantial, even qualitative, change took place in the 1960s. The year 1967 saw the enactment of the first statute under which a state undertook to shoulder a significant part of the burden of financing church schools. This was the Pennsylvania statute, invalidated by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which used the device of having the state "purchase secular services" from the nonpublic schools. In the same decision, the Court invalidated a statute adopted by Rhode Island in 1968 under which the state "supplemented" the salaries of teachers of secular subjects in the nonpublic schools.

The draftsmen of these two statutes had attempted to deal with the First Amendment barrier by subjecting grants of aid to restrictions designed to assure that the aid went only to the secular aspects of the schools involved. They appeared to have little doubt that arrangements in which government funds or other benefits were used for the general operation of sectarian schools would be unconstitutional. It was apparently hoped, however, that the separation requirement could be satisfied by insuring that the funds were not used for general operations. This Court nevertheless held that the plans violated the "entanglement" aspect of the three-way test which it has applied in recent cases. As phrased in *Lemon* (403 U.S. at 612-13), that test reads:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra*, at 647.

With this approach blocked, resort was had to its opposite—the simple arrangement of giving religious schools government assistance without strings attached. This meant going back to the general form of financing which the earlier statutes were designed to avoid. That is what was attempted in the statutes which came before this Court at its 1972-3 Term. They provided, *inter alia*, for per-pupil payments to nonpublic schools for supplying certain services "mandated" by the state, for other payments to cover costs of maintaining facilities and equipment, for reimbursing parents for parts of the tuition they paid to nonpublic schools and for tax benefits to some parents paying such tuition. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973); *Sloan* v. *Lemon*, 413 U.S. 825, 93 S. Ct. 2982 (1973); and *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472, 93 S. Ct. 2814 (1973).[1] Reiterating its "three-part test" (93 S. Ct. at 2965), as well as the broad ruling in the *Everson* decision quoted above (*id.* at 2969), this Court found that that approach was likewise unconstitutional.

In thus closing off both routes around the constitutional barrier to governmental aid to sectarian schools, this Court gave full recognition to the complaint of supporters of such aid that they were faced with an "insoluble paradox." In closing its opinion in *Sloan*, it said (93 S. Ct. at 2988):

> But if novel forms of aid have not readily been sustained by this Court, the "fault" lies not with the

1. In the *Sloan* decision, it was noted that the provisions in the Pennsylvania statute there invalidated, which barred the state from supervision of the operations of the affected schools, embodied "an effort to avoid the 'entanglement' problems that flawed its [Pennsylvania's] prior aid statute" (93 S. Ct. at 2985).

> doctrines which are said to create a paradox but rather with the Establishment Clause itself: "Congress" and the States by virtue of the Fourteenth Amendment "shall make no law respecting the establishment of religion." With that judgment we are not free to tamper, and while there is "room for play in the joints," *Walz* v. *Tax Commission, supra*, at 669, the Amendment's proscription clearly forecloses Pennsylvania's tuition reimbursement program.

There is nothing surprising about this result. It is merely a reflection of the historic principle that the Constitution bars government from resorting to any device whereby its resources are used to finance religious schools.

In its decision in *Nyquist* (93 S. Ct. at 2959), this Court took occasion to say that it did not regard "Jefferson's metaphoric 'wall of separation' between Church and State" as having "become 'as winding as the famous serpentine wall' he designed for the University of Virginia." It also noted, at two points in its decisions, that, when it upheld the use of state funds to provide transportation to parochial schools in the *Everson* case, it had characterized that arrangement as "approaching the 'verge' of impermissible state aid" (*Nyquist*, 93 S. Ct. at 2966; *Sloan*, *id.* at 2987).[2] It went on to say in *Sloan* (at 2987):

> In *Lemon*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial support." • • • Again today we decline to approach or overstep the "precipice" of establishment against

2. This language from *Everson* was similarly quoted at the beginning and again at the end of this Court's discussion of the constitutional issue in *Lemon*. 403 U.S. at 611-2, 624.

which the Religion Clauses protect. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions.

With respect to *Everson* and two later decisions upholding the use of public funds for textbooks at parochial schools and for construction of church-affiliated colleges (*Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Tilton* v. *Richardson*, 403 U.S. 672 (1971)), it said in *Nyquist* (93 S. Ct. at 2967):

> These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channelled to the secular without providing direct aid to the sectarian. *But the channel is a narrow one, as the above cases illustrate.* (Emphasis supplied.)[3]

Despite the clear thrust of these decisions, the court below insisted that the "Straits of Messina" left by this Court's rulings are still navigable for the substantial scale of state aid provided by Acts 194 and 195 (Jurisdictional Statement, p. 27a). We submit that this Court has made it clear that the Straits can accommodate such shallow-draft vessels as transportation and secular textbooks but not such carriers of massive aid as programs under which teachers on the public payroll give instruction in religiously affiliated

3. At its last Term, this Court, in *Marburger* v. *Public Funds for Public Schools*, 94 S. Ct. 3163 (1974), granted a motion to affirm the ruling of a three-judge District Court invalidating a New Jersey statute having substantially the same effect as the Pennsylvania statutes here involved. *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.C. N.J. 1973). We submit that that ruling, although issued without hearing argument and without written opinion, is entirely at odds with the ruling below in this case and, unless overruled, requires reversal here.

schools or under which educational materials and equipment are supplied for use in such schools. We urge this position in Point I. In Point II, we urge that this Court should also invalidate the provisions in Act 195 dealing with textbooks.

POINT I

The provisions in Acts 194 and 195 providing auxiliary services, instructional materials and instructional equipment for religious elementary and secondary schools violate the Establishment Clause of the First Amendment to the United States Constitution.

The decision below approves the use of state funds for sending teachers into sectarian schools to teach secular subjects and for supplying instructional equipment and materials, without regard to any limit on the amount of this assistance. The statutory ceilings of $30 and $25 per child were not relied upon by the court in reaching its decision. Hence, what the court approved is a procedure that could be used to provide massive government subvention of religious schools. In the words of this Court in *Nyquist* (93 S. Ct. at 2969): "It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny."

We submit that this form of aid violates all three aspects of the three-way test referred to above.

A. The Sectarian Purpose

In both its 1971 and its 1973 parochiaid decisions, this Court accepted declarations in the various state statutes before it that their provisions were designed to achieve specific secular purposes (*Lemon* case, 403 U.S. at 613; *Nyquist* case, 93 S. Ct. at 2966; *Sloan* case, 93 S. Ct. at 2985). Accordingly, it found that the statutes met the first part of the three-way test. Nevertheless, at various points in its 1973 opinions, it suggested that the statutes under review had the *purpose* of assisting religion. In discussing tax credits in *Nyquist,* it said that "their purpose and inevitable effect are to aid and advance • • • religious institutions" (93 S. Ct. at 2976; see also 2971). Again, in *Sloan,* it talked of the "intended consequences" of tuition reimbursement (93 S. Ct. at 2986). Thus, it appears that impermissible intent can be found from the nature of the program itself. These remarks even suggest that this Court's acceptance of the legislature's declaration of secular intent as a matter of law is in conflict with its recognition of a sectarian intent as a matter of fact.[4]

The statutes under review in the present case state only that the public welfare requires full development of the intellectual capacities of school-age children and that the provisions of the Acts are intended to insure that every child in the Commonwealth "will equitably share" in certain benefits previously available to children in public schools. (See Jurisdictional Statement, pp. 108a-109a; 112a-113a). It is by no means clear that this can be construed as the same kind of declaration of secular legislative

4. This point is discussed in *Note*: "Establishment Clause Analysis of Legislative and Administrative Aid to Religion," 74 Col. L. Rev. 1175, 1178-81 (1974).

purpose as was embodied in the statutes reviewed in the earlier cases. We submit, however, that, even if it is, the "purpose" aspect of the three-way test loses all significance if this Court routinely accepts such declarations at face value. The purpose of those who have urged these forms of aid to sectarian schools is to insure the continued existence of those schools as instruments for achievement of their religious purposes. *Education* is available in the public schools for those children who now go to nonpublic schools. The reason for demanding that the state finance secular instruction *in the religious schools* is the overriding consideration that the children will there receive religious instruction and that they will receive their secular instruction in the religious atmosphere which these schools have created. That is a religious, not an educational, purpose.

B. The Sectarian Effect

The procedures authorized by these statutes could be used to subsidize most of the operations of a sectarian school. Take, for example, the auxiliary services provisions which authorize use of state funds to pay for "secular • • • services" that are "provided for public school children" in the state. This language describes the entire educational process of the public schools. Thus, the statutory formula would authorize a state subsidy for all educational activities of the parochial schools except those that are sectarian in content. Whether or not the state is now financing so broad a range of services, it could do so under the statutory formula if sufficient financing were supplied.

The court below rejected this argument on the ground that, in fact, something less in the way of services was in

fact being supplied at this time (Jurisdictional Statement, pp. 30a-38a). It said (at 37a) that the statute was not subject "to the open-ended construction plaintiffs suggest" and that there was no evidence from which the likelihood of such construction could be inferred.

In response to this, it should be noted: (1) That the fact that only limited services are now being given may well be attributable to the limited amount of money now available; (2) that the judgment of the court below, unlike its judgment with respect to instructional equipment, does not contain any limitation on its approval of these provisions of the statute; and (3) that nothing in the reasoning of the court's opinion upholding this provision of the statute suggests that its ruling would not be equally applicable to the broad interpretation. The simple fact is that the statute, as worded, does permit the broad interpretation and we doubt that any effort to limit its terms could be made in a manner consistent with this Court's decisions in this area.

The main thrust of this Court's opinions in the 1973 parochiaid cases was that the Constitution prohibits any plan under which the government may "openly subsidize parochial schools" (*Nyquist* case, *supra,* 93 S. Ct. at 2969). We submit that the amount of aid available under the Acts in the form of auxiliary services and educational equipment and materials, even as authorized by the court below, constitutes such subsidization.

The 1973 decisions also made it clear that the "primary effect" aspect of the three-way test does not mean exclusive or even predominant effect. They leave little room for

doubt that a statute cannot be upheld if it has a substantial sectarian effect even though it also has a substantial secular effect. Thus, in *Nyquist,* this Court found it sufficient that the maintenance programs had "a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools" (93 S. Ct. at 2966). This aspect of the ruling was highlighted by Justice White in his dissent where he pointed out that the various New York programs undoubtedly had as one of their effects "preserving the secular functions" of the church-related schools (93 S. Ct. at 2998).

In sum, we submit that, even if the program of governmental support involved here could be conducted without impermissible entanglement, the point we discuss next, it fails under the effect test.

C. Administrative Entanglement

The form of aid—auxiliary services—provided in Act 194 is not markedly different from those which were condemned by this Court in the *Lemon* decision, particularly the arrangement in effect in Rhode Island under which the government paid part of the salaries of teachers in sectarian schools. Here the government would pay the whole salary of teachers who would be sent to teach in sectarian schools.[5]

In *Lemon,* this Court noted that the legislatures of both Pennsylvania and Rhode Island, recognizing the religious orientation of the schools involved, had created "statutory restrictions designed to guarantee the separation be-

5. Although this procedure is not specified in the statute, it is the practice under the implementing regulations, as the court below made clear (Jurisdictional Statement, pp. 28a-29a).

tween secular and religious educational functions and to ensure that State financial aid supports only the former" (403 U.S. at 613). As to the Rhode Island law, it said that the fact that "parochial schools involve substantial religious activity and purpose" had "led the legislature to provide for careful governmental controls and surveillance by state authorities in order to insure that state aid supports only secular education" (403 U.S. at 616).

In this third attempt to provide large-scale financing of parochial schools, Pennsylvania has sought to solve this problem by simply omitting statutory safeguards. But the decisions of this Court make it clear that such safeguards are constitutionally required.

Thus, in *Lemon*, this Court said, concerning the Rhode Island statute there considered (403 U.S. at 619):

> The Rhode Island Legislature has not, *and could not*, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. *The State must be certain, given the Religion Clauses*, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion. (Emphasis supplied.)

The Court went on to say (*ibid*):

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure

> that these restrictions are obeyed and the First Amendment otherwise respected.

Yet it is questionable whether regulations could be drawn that would effectively counter the normal pressures upon those who teach in a school to conform to its policies and atmosphere. To be effective, the regulations and their administration would have to be so comprehensive as to entail an extreme degree of involvement of government officials in the affairs of the school. Indeed, it is this inherent conflict—between the need to attach limitations and the entangling effect of those limitations once they are attached—that creates the "insoluble paradox" referred to above (pp. 10-11) which has the effect of barring all substantial government aid to sectarian schools.

A key aspect of the *Lemon* decision was its conclusion that it is difficult if not impossible to make sure that any particular teacher is refraining from sectarian activity in the atmosphere of a sectarian school. Distinguishing the decision in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), upholding the New York State law under which the state financed the lending of textbooks for use in nonpublic schools, this Court said (403 U.S. at 617) that "teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." Hence, the "conflict of functions inheres in the situation." Noting that teachers in religious schools are under the direct supervision of a church, the Court said: "Religious authority necessarily pervades the school system" (*ibid*). Although a number of teachers had testified that they did

not inject religion into their secular classes, the Court believed that the record suggested "the potential if not actual hazards of this form of state aid" (*id.* at 618). It found that the necessary supervision of the work of the teachers "will involve excessive and enduring entanglement between state and church" (*id.* at 619).

One of the factors considered significant by this Court in finding improper entanglement in the Rhode Island arrangement is absent here. The teachers whose salaries are paid out of public funds are, at least presumably, appointed by public authorities rather than by those who operate the religious schools. Examination of the *Lemon* opinion, we submit, will show that the fact that the teachers were under the authority of the church was but one of a number of factors deemed significant by the Court. At least as important was the general religious atmosphere of the school, an essential aspect of sectarian institutions.

Furthermore, it is not in reason to assume that those responsible for the overall operation of a school, and particularly for its functioning as an agency for inculcation of a particular religion, will refrain altogether from seeking to influence what goes on in the classrooms. It is hardly likely that these publicly financed activities will operate as independent enclaves within each nonpublic school, subject to direction only by absent public officials. In *Lemon*, this Court pointed to "the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions" (403 U.S. at 619). The same kind of possibility exists here—that of friction over the degree of independence of the teacher. There could also

be differences between private schools and public authorities about the selection of the personnel who are to enter the private schools.

With respect to instructional equipment, it should be noted that the limitation imposed by the court below either nullifies that section or means very little. It is difficult to imagine any kind of instructional equipment that cannot be "diverted to religious purposes"—certainly not in the "projection equipment" or "recording equipment" specifically referred to in the statute. Even "laboratory equipment," also referred to, could be used in courses teaching a religious view of the world about us.

We suggest that compliance with the principles laid down by this Court in its recent cases would require close and constant supervision of the day-to-day use in the schools of any equipment and materials supplied under this statute. Such supervision would of course violate the "entanglement" aspect of the First Amendment. Even if it did not, there would still be the prohibition of political entanglement, to which we now turn.

D. Political Entanglement

As we have seen, the statutes considered by this Court in the 1973 cases sought to avoid the flaw of governmental entanglement which had brought down the statutes considered in 1971. Consequently, the administrative entanglement aspect of the three-way test did not figure prominently in the 1973 rulings. The political aspect of entanglement was, however, invoked.

In *Nyquist,* having found that all three of the challenged programs had "the impermissible effect of advancing religion," this Court said that it was unnecessary to consider whether they would result in entanglement of the state with religion in the sense of "continuing state surveillance" (93 S. Ct. at 2976). It said, however, that, "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carried grave potential for entanglement in the broader sense of continuing political strife over aid to religion" (*ibid*). The Court (at 2977) referred specifically to its statement in the *Lemon* case (403 U.S. at 623) that:

> The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow.

The Court noted that all three of the programs before it "start out at modest levels," but that experience showed that aid programs "tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies • • •. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for serious divisive political consequences needs no elaboration" (93 S. Ct. at 2977-8). This factor was found to be applicable even to the tax relief aspect of the New York statute. This Court said that that provision "will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable" (93 S. Ct. at 2977).

The discussion of this aspect of entanglement in the *Lemon* decision follows the discussion of administrative

entanglement and starts with a statement that this is a "broader base of entanglement" (403 U.S. at 622). We submit that it is broad enough to include all forms of governmental aid to sectarian schools that involve any substantial amount of expenditure of tax-raised funds.

That is surely the case here. The State of Pennsylvania is presently financing the programs under these two statutes at carefully chosen levels—$30 per child for auxiliary services, $10 for textbooks and $25 for instructional materials and equipment. Each time the matter of financing these programs comes up, these figures will be vulnerable to attack. The Legislature will be under pressure from one side to reduce the volume of aid to the vanishing point and, from the other, to raise it to the point at which it virtually takes over financing of what are considered to be the secular aspects of the sectarian schools' operations.

POINT II

The provisions in Act 195 providing for supplying textbooks for use in religious elementary and secondary schools violate the Establishment Clause of the First Amendment to the United States Constitution.

The court below upheld those portions of Act 195 which provide for the lending of textbooks to children attending nonpublic schools, regarding this aspect of the case as controlled by *Board of Education* v. *Allen,* 392 U.S. 236 (1968). We believe that the provisions of Acts 194 and 195 should be regarded as a single package which, viewed as such, supplies state aid to church-affiliated schools on a scale that is plainly unconstitutional. Without discussing that point, however, we urge here that this Court should

reconsider the assumption on which its ruling in the *Allen* case was based—that no elaborate policing is necessary to ensure that the textbooks furnished by the state are secular rather than sectarian.

That this assumption was vital to the *Allen* decision is clear. This Court said (392 U.S. at 244-45):

> Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as "merely making available secular textbooks at the request of the individual student," supra, *and the record contains no suggestion that religious books have been loaned.* Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, *are unable to distinguish between secular and religious books* or that they will not honestly discharge their duties under the law. In judging the validity of the statute on this record we must proceed *on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.* (Emphasis supplied.)

Subsequent experience shows that this assumption has not been borne out. A study of operations under the 1965 New York statute upheld in *Allen* appears in *Note,* "Sectarian Books, the Supreme Court and the Establishment Clause," 79 Yale L.J. 111 (1969). Covering the 1968-69 academic year, the study analyzes the way in which textbooks are reviewed by public authorities in the state, the standards those authorities apply and the books that have

actually been approved for state financing under the statute.

This study found, *inter alia,* that the statute entrusts responsibility for determining sectarian content "to officials without needed qualifications and with extensive other duties" (*id.* at 119), that these officials "generally lack knowledge and expertise needed for determining sectarianism" (124), that some school districts "have sometimes circumvented review responsibility entirely by delegating the screening function to interests wholly outside of the school system," including publishers and even diocesan superintendents (128), that, under the law, a textbook may be financed by the state if it is approved by a single public school district even if it is rejected by other boards on the ground that it is sectarian (129) and that, as a simple matter of fact, "Sectarian textbooks are being purchased under the New York Textbook Loan Law" (138). Summing up, the writers say (at 130):

> The law is complex and burdensome for the thousands of officials responsible for its administration. Its review requirement is shirked or mishandled within many districts. Special provisions of the Law give a state-wide "multiplier effect" to instances of dereliction of textbook review responsibility and review incompetency, while confining the effects of vigilant textbook review to the borders of the vigilant district.[6]

6. It may be suggested that the kind of abuses revealed in the *Yale Law Journal* note do not show that the statute is unconstitutional but only that there have been excesses which should be restrained. We suggest, however, that any such approach would require separate challenge of each textbook improperly approved. This would entail extensive involvement of the courts in litigation over details. As the authors of the note say (at 130): "It is not adequate to rely on judicial review to cure the statutory violations. The violations of the review requirement are not likely to be attacked effectively as they occur."

It should cause no surprise that it has proved to be difficult to police the provision limiting state financing to secular books. The difficulty reflects one facet of the separation principle.

Consider the situation of a public school official asked to approve a specific textbook which a parochial school wishes to use. It may be *A History of the United States I and II* (1965) by Msgr. E. Goebel, Rev. T. Quigley and J. O'Loughlin, described in the *Yale Law Journal* note, pp. 133-134. The text, which carries an imprimatur and *nihil obstat*, contains such passages as, "The State exists for one purpose; the good of the people. This was made clear by Pope Pius XII in his encyclical *Summi Pontificatus* (On the Function of the State in the Modern World). * * *" The official who is asked to approve this text knows that rejection will place him in a position of open conflict with a religious group. He knows, on the other hand, that approval will probably not arouse public comment of any kind. It is no reflection on either public officialdom or sectarian leadership to say that this pressure will frequently result in nullification of the statutory safeguard. In short, in the words of the Law Journal note, the statute demands "from a bureaucracy a performance of which it is incapable" (79 Yale L. J. at 127).

A parallel phenomenon was considered by this Court in the *Lemon* case where one of the issues was whether teachers in a parochial school who were required by statute to refrain from sectarian instruction would be "unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities" (403 U.S. at 619). The Court concluded that, while it could not assume that the teachers *would* be unsuccessful, it was still

true that "the potential for impermissible fostering of religion is present" (*ibid*).

We submit that at least one function of the separation principle is to ensure that public officials are not placed in this kind of dilemma. Public officials must, of course, enforce statutory provisions concerning construction and other safety and health standards imposed not only on church schools but also on churches. They are required also to insure that certain secular subjects are taught in church schools. These responsibilities, however, do not entail making judgments about what is essentially a religious question—whether a textbook on a secular subject which a church school wishes to use (or the instruction given in such a subject) is sectarian. The separation principle is seriously eroded when such procedures are permitted.

Conclusion

It is respectfully submitted that the decision below should be reversed.

Respectfully submitted,

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